DEPARTMENT OF STATE REVENUE

40-20170934P.LOF

Letter of Findings: 40-20170934P
Utility Receipts Tax
For Tax Years 2013, 2014, and 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Public Utility did not demonstrate that it exercised reasonable care, and was therefore not entitled to the abatement of the negligence penalty.

ISSUE

I. Tax Administration - Negligence Penalty.

Authority: IC § 6-2.3-2-1; IC § 6-2.3-3-11; IC § 6-2.5-3-2; IC 6-2.5-3-5; IC § 6-8.1-10-2.1; 45 IAC 15-11-2; Commissioner's Directive 18 (October 2013; August 2014).

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a multi-national public utility selling and distributing natural gas to customers in Indiana. Taxpayer is required to make quarterly estimated utility receipts tax payments to the Indiana Department of Revenue ("Department"). As the result of an audit, the Department determined that Taxpayer had not remitted Indiana utility receipts taxes for the tax years 2013, 2014, and 2015 ("Tax Years at Issue"). Taxpayer did not timely remit the estimated payment on or before the required due dates. As a result, the Department imposed a late penalty.

Taxpayer agrees with the imposition of the base tax and interest, but asks that the Department abate the negligence penalty. A hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

I. Tax Administration - Negligence Penalty.

DISCUSSION

The Department imposed a ten percent negligence penalty because Taxpayer failed to timely remit the quarterly estimated payments. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

(1) fails to file a return for any of the listed taxes;

(2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;

(3) **incurs, upon examination by the department, a deficiency that is due to negligence**;

(4) fails to timely remit any tax held in trust for the state; or

(5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department[.] (**Emphasis added**).

45 IAC 15-11-2(b) further states:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. **Ignorance of the listed tax laws, rules and/or regulations is treated as negligence**. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer. (**Emphasis added**).

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
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> (2) judicial precedents set by Indiana courts;
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> (3) judicial precedents established in jurisdictions outside Indiana;
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> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
>
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
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> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The audit report found that "[t]he gas titled meters were in Indiana . . . and the sourced meters (where the customer took possession of the gas) were also in Indiana." The audit report further stated, "[the] sourcing rules dictate that all receipts (sales) that are consummated or completed in Indiana are subject to the utility receipts tax." The audit explanation of adjustments specifically cited to IC § 6-2.3-3-11, which states:

> Subject to IC 6-2.3-2 and this chapter, gross receipts derived from activities or businesses or any other sources within Indiana **include furnishing utility services to an end user in Indiana for consumption in Indiana, regardless of whether the:**
>
> (1) utility services are delivered through the pipelines, transmission lines, or other property of another person;
>
> **(2) taxpayer providing the utility service is or is not a resident or a domiciliary of Indiana**; or
>
> (3) transaction is subject to a deduction under IC 6-2.3-5-5.
>
> (**Emphasis added**).

In this instance, Taxpayer requests that the Department abate the negligence penalty, arguing that the law regarding the imposition of utility receipts tax is unclear. Taxpayer cites to IC § 6-2.3-2-1, which states:

> An income tax, known as the utility receipts tax, is imposed upon the receipt of:
>
> (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
>
> (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a

taxpayer that is not a resident or a domiciliary of Indiana.

Taxpayer argues that IC § 6-2.3-2-1(2) does not apply to it because the Indiana customers are serviced out of its Chicago, Illinois location and thus the "business activity" takes place in Illinois, *i.e.* outside the state of Indiana. During the protest hearing, Taxpayer's representative claimed to not be aware of IC § 6-2.3-3-11 and continued to assert that what constitutes "activities in Indiana" is unclear under the applicable statutes. However, Taxpayer does not dispute that it owes utility receipts tax for the Tax Years at Issue arising from the sale of natural gas to customers in Indiana. In addition, Taxpayer stated that it had started collecting utility receipts taxes from its customers in 2003, and later unilaterally decided that it should not have been collecting the tax. Taxpayer argued that Indiana's passage of the use tax law (IC § 6-2.5-3-2; IC § 6-2.5-3-5) expressed an intention that end users were to remit use tax on the purchase of utilities to the state of Indiana, passing the liability for the utility receipt tax to the end purchasers.

Taxpayer's interpretation of IC § 6-2.3-2-1 is unreasonable and does not comport with the plain language of the statute. IC § 6-2.3-2-1(2) states that the utility receipts tax is imposed on "receipts derived from activities or businesses or any other sources within Indiana **by a taxpayer that is not a resident or domiciliary of Indiana**." (**Emphasis added**). In addition, Taxpayer's interpretation ignores the plain language of IC § 6-2.3-3-11, which explicitly defines "activities or businesses or any other sources within Indiana" to include "**furnishing utility services to an end user in Indiana for consumption in Indiana**, regardless of whether the . . . taxpayer providing the utility service **is or is not a resident or a domiciliary of Indiana.**" (**Emphasis added**).

Furthermore, the Department's Commissioner's Directive 18 (October 2013) 20131127 Ind. Reg. 045130520NRA, and Commissioner's Directive 18 (August 2014) 20140924 Ind. Reg. 045140372NRA (collectively "Commissioner's Directive 18") state:

> Generally, retail receipts from **all utility services consumed within Indiana** are subject to the utility receipts tax or the utility services use tax **regardless of the point of generation or transmission across state lines**. (**Emphasis added**).

Taxpayer's argument that it was unaware of or had reasonably misinterpreted Indiana law governing the utility receipts tax is untenable. Taxpayer cites to no authority for the proposition that Indiana's use tax laws negate its obligations under the utility receipts tax statutes. The language of these statutes is not ambiguous and guidance issued in Commissioner's Directive 18 instructs utility providers that they must collect utility receipt taxes on sales of utilities to Indiana customers. A taxpayer of this size and level of sophistication should be expected to be aware of the utility receipts tax statutes in the jurisdictions in which it conducts business. As stated in 45 IAC 15-11-2(b), "[i]gnorance of the listed tax laws, rules and/or regulations is treated as negligence." Taxpayer did not exercise "ordinary business care and prudence" in its awareness and application of laws and departmental guidance that directly impact its primary business. Taxpayer has not demonstrated that its misapplication of Indiana law was due to reasonable cause and is therefore not entitled to abatement of the negligence penalty.

FINDING

Taxpayer's protest of the imposition of negligence penalty is respectfully denied.

February 16, 2018

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An html version of this document.